Airsquare Sdn Bhd v Eng Keat Seng and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02(NCVC)(W)-1617–07 OF 2012 AND B-02(NCVC)(W)-2009–09 OF 2012
RAMLY ALI, ZAHARAH IBRAHIM AND ANANTHAM KASINATHER JJCA
29 APRIL 2013

Contract — Breach — Oral subcontract — Value of contract sum — Quantifying sum payable for work completed — Whether contract sum or provisional sum — Distinction of — Whether subcontract was lump sum contract or provisional contract — Whether trial judge by ruling subcontract as lump sum contract should have ordered judgment for sum agreed — Whether trial judge erred when allowing judgment only for retention sum — Whether warranted appellate intervention

The respondent had orally appointed the appellant as the subcontractor for the supply and installation of equipment, to install piping and ducting works for air-conditioning and a mechanical ventilation system for the 14th and 15th floors of a project known as 'Cadangan Pengubahan Dalam kepada 18 Tingkat Kompleks Genting Hotel'. Pursuant to the oral appointment, the respondent had instructed the appellant to commence works pursuant to this subcontract. A sum of RM620,000 was agreed by the parties to be the contract sum. The respondent's case was that the above sum was a provisional sum only and the precise sum payable to the appellant for the works was to be based on the value of the work completed by the appellant. The appellant commenced a claim in the High Court to recover the above subcontract sum less the sum of RM363,475 (in the aggregate) already paid by the respondent towards the subcontract sum. The trial judge held, inter alia, that the contract was a lump sum contract for RM620,000. The primary reason was because exh P3, the payment certificate, issued on behalf of the respondent and the subcontract sum stipulated in this certificate was consistent with the appellant's case. The trial judge further ruled that as the value of the work completed by the appellant, according to exh P3, amounted to RM420,000, the amount payable by the respondent to the appellant pursuant to the lump sum contract should not exceed the above amount. Since it was not in dispute that the respondent had already paid the amount certified to be outstanding in exh P3 amounting to RM179,715, the trial judge ruled that there were no further monies due to appellant apart from the retention sum. Since the retention sum stipulated in exh P3 amounted to only RM52,700, the trial judge ordered judgment in favour of the appellant for this sum.

Held, allowing appeal with costs and setting aside the order of the High Court:

(1) Upon Her Ladyship's ruling when the contract was a lump sum contract

for RM620,000, it must necessarily follow that the appellant was entitled to recover this amount, so long as it had completed the works undertaken by it pursuant to the subcontract. This is because the difference between RM620,000 and the value of the works completed amounting to RM420,000 represents the profit element in the subcontract. It was inconsistent for Her Ladyship to have on the one hand ruled the subcontract to be a lump sum contract and simultaneously rule the appellant to be only entitled to RM420,000 representing the purported value of the work completed by the appellant. Accordingly, following Her Ladyship's ruling that the subcontract between the parties was a lump sum contract, Her Ladyship should have ordered judgment in favour of the appellant for the sum of RM620,000. less the aggregate of the payments made by the respondent (see para 7).

(2) There was overwhelming evidence that the appellant as the subcontractor had not only completed the subcontract works to the satisfaction of the respondent but there was both oral and documentary evidence that these completed works were incorporated in 'as-built drawings' and the drawings and the works were handed over to the main contractor following site verification conducted by the respondent in the absence of the appellant. In the light of the overwhelming evidence of the completion of the subcontract works by the appellant and the acceptance of these works by the main contractor without any complaint, the error on the part of the trial judge in allowing judgment only for the retention sum warranted appellate intervention (see para 8–9).

[Bahasa Malaysia summary

Responden telah melantik perayu secara lisan, sebagai subkontraktor bagi pembekalan dan pemasangan peralatan, untuk kerja-kerja pemasangan paip dan penyaluran penyaman udara dan sistem peredaran mekanikal bagi tingkat 14 dan 15 sebuah projek yang dikenali sebagai 'Cadangan Pengubahan Dalam kepada 18 Tingkat Kompleks Genting Hotel'. Berikutan pelantikan lisan tersebut, responden telah mengarahkan perayu untuk memulakan kerja-kerja di bawah subkontrak. Sejumlah RM620,000 telah dipersetujui oleh pihak-pihak sebagai jumlah kontrak. Kes responden adalah bahawa jumlah tersebut adalah jumlah sementara sahaja dan jumlah sebenar yang perlu dibayar kepada perayu bagi kerja-kerja tersebut adalah berdasarkan penilaian kerja yang diselesaikan oleh perayu. Perayu memulakan tuntutan di Mahkamah Tinggi bagi mendapatkan balik jumlah subkontrak kurang daripada jumlah RM363,476 (dalam agregat) yang telah dibayar oleh responden bagi jumlah subkontrak. Hakim perbicaraan memutuskan, antara lain, bahawa kontrak adalah kontrak seluruh jumlah iaitu RM620,000. Alasan utama adalah kerana eksh P3, iaitu sijil pembayaran, yang dikeluarkan bagi pihak responden dan jumlah subkontrak yang dinyatakan dalam sijil ini adalah selari dengan kes perayu. Hakim perbicaraan seterusnya memutuskan lagi

bahawa memandangkan penilaian kerja yang diselesaikan oleh perayu, menurut eksh P3, berjumlah RM420,000, jumlah yang perlu dibayar oleh responden kepada perayu di bawah kontrak seluruh jumlah tidak sepatutnya melebihi jumlah yang dinyatakan. Oleh kerana tidak dipertikaikan bahawa responden telah pun membayar jumlah yang dinyatakan terhutang dalam eksh P3 yang mana berjumlah RM179,715, hakim perbicaraan memutuskan bahawa tidak terdapat jumlah terhutang selanjutnya kepada perayu selain daripada jumlah ditahan. Oleh kerana jumlah yang dinyatakan dalam eksh P3 berjumlah RM52,700, hakim perbicaraan memberikan penghakiman berpihak kepada perayu bagi jumlah ini.

Diputuskan, membenarkan rayuan dengan kos dan mengetepikan pernitah oleh mahkamah Tinggi:

(1) Dengan keputusan Yang Arif bahawa kontrak adalah kontrak seluruh jumlah bagi RM620,000, semestinya diikuti bahawa perayu berhak mendapatkan balik jumlah ini, asalkan ia telah menyelesaikan kerja-kerja yang diakujanji di bawah subkontrak. Ini kerana perbezaan RM620,000 dengan nilai kerja-kerja yang diselesaikan berjumlah RM420,000 menunjukkan elemen keuntungan dalam subkontrak. Adalah bercanggah bagi Yang Arif untuk dalam satu keadaan memutuskan bahawa subkontrak adalah kontrak seluruh jumlah dan pada masa yang sama memutuskan perayu hanya berhak ke atas RM420,000 sebagai nilai yang berupa kerja-kerja yang telah diselesaikan oleh perayu. Oleh itu, berikutan keputusan Yang Arif bahawa subkontrak antara pihak-pihak adalah kontrak seluruh jumlah, Yang Arif sepatutnya memberikan penghakiman yang memihak kepada perayu untuk jumlah RM620,000, kurang daripada agregat bayaran yang dibuat oleh responden (lihat perenggan 7).

(2) Terdapat bukti kukuh bahawa perayu sebagai subkontraktor bukan sahaja telah menyelesaikan kerja-kerja subkontrak dengan memuaskan hati responden tetapi ada dua keterangan lisan dan dokumentari bahawa kerja-kerja ini siap telah dimasukkan dalam 'as built drawings' dan lukisan-lukisan dan kerja-kerja telah diserahkan kepada kontraktor utama berikutan pengesahan tapak yang dijalankan oleh responden dalam ketiadaan perayu. Melihat pada keterangan kukuh penyiapan kerja-kerja subkontrak oleh perayu dan penerimaan kerja-kerja oleh kontraktor utama tanpa sebarang aduan, kekhilafan di pihak hakim bicara dalam membenarkan penghakiman bagi jumlah ditahan mewajarkan campur tangan mahkamah rayuan (lihat perenggan 8–9).]

Notes

For a case on oral subcontract, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) para 3132.

Appeal from: Suit No (NCVC 6) 22–1433 of 2008 (High Court, Shah Alam)

Chen Woon Yong (Chen Woon Yong & Co) in Civil Suit No B-02(NCVC)(W)-1617–07 of 2012, for the appellant.
Lim Fong Say (Azli, Lee Swee Seng & Co) in Civil Suit No B-02(NCVC)(W)2009–8 of 2012, for the appellant.
Lim Fong Say (Azli, Lee Swee Seng & Co) in Civil Suit No B-02(NCVC)(W)-1617–07 of 2012, for the respondent.
Chen Woon Yong (Chen Woon Yong & Co) in Civil Suit No B-02(NCVC)(W)2009–8 of 2012, for the respondent.

Anantham Kasinather JCA (delivering judgment of the court):

THE BACKGROUND FACTS

[1] On and about September 2007, Eng Keat Seng had orally appointed Airsquare Sdn Bhd as the subcontractor for the supply and installation of equipment, to install piping and ducting works for air-conditioning and a mechanical ventilation system for the 14th and 15th floors of a project known as 'Cadangan Pengubahan Dalam kepada 18 Tingkat Kompleks Genting Hotel Sedia ada Di atas Sebahagian Lot 9575 (50B), Genting Highlands, Mukim Bentong, Daerah Bentong, Negeri Pahang Darul Makmur'. Pursuant to the oral appointment, Eng Keat Seng had instructed Airsquare Sdn Bhd to commence works pursuant to this subcontract. Eng Keat Seng is the appellant in Civil Appeal No B-02(NCVC)(W)-2009–08 of 2012 and the respondent in Civil Appeal No B-02(NCVC)(W)-1617–07 of 2012. Similarly Airsquare Sdn Bhd is the respondent in Civil Appeal No B-02(NCVC)(W)-2009–08 of 2012 and the appellant in Civil Appeal No B-02(NCVC)(W)-1617–07 of 2012. The two appeals were heard together. In this judgment, we will refer to the parties by name so as to avoid any confusion.

[2] On 3 December 2007, Airsquare Sdn Bhd forwarded its quotation to Eng Keat Seng for this subcontract and quantified the value of the contract to be RM626,216. This sum was subsequently revised to RM620,000. Eng Keat Seng disputed that agreement had been reached for the contract sum to be RM620,000. Eng Keat Seng's case was that the sum of RM620,000 was a provisional sum only and the precise sum payable to Airsquare Sdn Bhd for the works was to be based on the value of the work completed by Airsquare Sdn Bhd.

[3] Airsquare Sdn Bhd commenced a claim in the Shah Alam High Court seeking recovery for the subcontract sum of RM620,000 less the sum of RM363,475 (in the aggregate) already paid by Eng Keat Seng towards the

subcontract sum. The learned trial judge on the conclusion of the trial ordered Eng Keat Seng to only pay the sum of RM52,700 to Airsquare Sdn Bhd, this sum representing the retention sum withheld by Eng Keat Seng in respect of payments made pursuant to the certificates issued by Eng Keat Seng.

[4] In the hearing before the learned trial judge, there were only two issues posed to Her Ladyship. The first was whether the subcontract was a lump sum contract for RM620,000 as contended by Airsquare Sdn Bhd or a provisional contract based on the value of work completed by Airsquare Sdn Bhd. The learned trial judge decided the first issue in favour of Airsquare Sdn Bhd by ruling that the contract was a lump sum contract for RM620,000. The primary reason provided by Her Ladyship for resolving the first issue in favour of Airsquare Sdn Bhd was because payment certificate dated 16 February 2008 and marked as exh P3 was issued on behalf of Eng Keat Seng and the subcontract sum stipulated in this certificate was consistent with Airsquare Sdn Bhd's case. Her Ladyship opined that since exh P3 issued on behalf of Eng Keat Seng itself recognised the contract sum to be for the lump sum figure of RM620,000, the oral evidence of Airsquare Sdn Bhd was consistent with the contemporaneous documentary evidence in the form of exh P3. Accordingly, Her Ladyship ruled that the contract between the parties was a lump sum contract for the sum of RM620,000.

[5] As regards the second issue, Her Ladyship ruled that insofar as the value of the work completed by Airsquare Sdn Bhd, according to exh P3, amounted to RM420,000, the amount payable by Eng Keat Seng to Airsquare Sdn Bhd pursuant to the lump sum contract should not exceed this amount. Since it was not in dispute that Eng Keat Seng had already paid the amount certified to be outstanding in exh P3 amounting to RM179,715, Her Ladyship ruled that there were no further monies due to Airsquare Sdn Bhd apart from the retention sum. Since the retention sum stipulated in exh P3 amounted to only RM52,700, Her Ladyship ordered judgment in favour of Airsquare Sdn Bhd for this sum.

THE DECISION OF THE COURT

[6] Before undertaking a critical examination of the judgment of the High Court, in our judgment, it would be useful to understand the distinction between a lump sum contract and a provisional sum contract. A lump sum contract has been defined to be a contract whereby the employer becomes liable to pay the contractor a fixed sum, irrespective of the contractor's as-built costs. The difference between the price and the actual costs of the works to the contractor will constitute the contractor's profit or loss. The employer is therefore given a figure representing his global exposure, although this figure may be subject to adjustment as provided by the contract (see the book

Understanding and Negotiating Turnkey and EPC Contracts (2nd Ed), paras 1–20 p 10). A provisional contract on the other hand refers to a contract where the employer maintains control over certain aspects of the construction — for example, the purchase of know-how, the hiring of the subcontractors or the choice of the materials to be used in the works. The contract specifies the amount that is then allocated in accordance with the direction of the employer's representative (see paras 5–43 p 86 of the same book).

[7] Applying the above definition to the findings of the learned trial judge, with respect, we are unable to follow the reasoning of Her Ladyship. In our judgment, upon Her Ladyship ruling the contract to be a lump sum contract for RM620,00, it must necessarily follow that Airsquare Sdn Bhd is entitled to recover this amount, so long as it has completed the works undertaken by it pursuant to the subcontract. This is because the difference between RM620,000 and the value of the works completed amounting to RM420,000 represents the profit element in the subcontract. In our judgment, it is inconsistent for Her Ladyship to have on the one hand ruled the subcontract to be a lump sum contract and simultaneously rule Airsquare Sdn Bhd to be only entitled to RM420,000 representing the purported value of the work completed by Airsquare Sdn Bhd. Accordingly, in our judgment, following Her Ladyship's ruling that the subcontract between the parties was a lump sum contract, Her Ladyship should have ordered judgment in favour of Airsquare Sdn Bhd for the sum of RM620,000 less the aggregate of the payments made by Eng Keat Seng.

[8] On the facts of this case, there is overwhelming evidence that Airsquare Sdn Bhd as subcontractor had not only completed the subcontract works to the satisfaction of Eng Keat Seng but there was both oral and documentary evidence that these completed works were incorporated in as-built drawings and the drawings and the works handed over to the main contractor following site verification conducted by Eng Keat Seng in the absence of Airsquare Sdn Bhd. The oral evidence is to be found in the answers derived from Eng Keat Seng's witness SD1 during cross-examination. The documentary evidence took the form of the as-built drawings tendered to the court during the course of the trial. Indeed, following the completion of the subcontract works, a handing over check list was undertaken and the contents of this document evidences an agreement on the part of all the parties of the satisfactory completion of the subcontract by Airsquare Sdn Bhd.

[9] In the light of the overwhelming evidence of the completion of the subcontract works by Airsquare Sdn Bhd and the acceptance of these works by the main contractor without any complaint, in our judgment, the error on the part of the learned judge in allowing judgment only for the retention sum warrants appellate intervention. Accordingly, we set aside the order of the High

Court judge and ordered judgment in favour of Airsquare Sdn Bhd for the difference between RM620,000 and the sum of RM369,500 which counsel for Airsquare Sdn Bhd readily agreed be set off against this sum. In other words, the effect of our judgment is that Eng Keat Seng fails in Appeal No B-02(NCVC)(W)-2009–08 of 2012 and this appeal is accordingly dismissed with costs. Airsquare Sdn Bhd succeeds in Appeal No B-02(NCVC)(W)-1617–07 of 2012 and judgment is ordered in favour of Airsquare Sdn Bhd in Appeal No B-02(NCVC)(W)-1617–07 of 2012 in the amount of RM250,500. Eng Keat Seng is hereby ordered to pay costs of RM10,000 to Airsquare Sdn Bhd in respect of both appeals. The deposit is refunded to the respective appellants in both appeals.

Appeal allowed with costs and order of the High Court set aside.

Reported by Ashgar Ali Ali Mohamed